After *Florida Power*, the Board again tried to assert its theory of indirect coercion by promulgating broad strictures on union discipline of supervisors who might form a "reservoir" from which an employer selected its §8(b)(1)(B) representative. In *Royal Electric*, 481 U.S. at 597, this Court again rejected the Board's overreaching theory of indirect coercion. The Board's "chain of suppositions" that an employer *might* be restricted in its future choice of representative could not be reconciled with the structure of the NLRA. *Id.* at 586. The Board may not find an §8(b)(1)(B) violation absent specific factual findings on whether a union's sanction may adversely affect the employer representative's performance of collective-bargaining or grievance adjustment duties. *Id.* at 585. (*Citing American Broadcast Cos. v, Writer's Guild, West*, 437 U.S.411, 430 (1978)). Thus, a violation of §8(b)(1)(B) can occur "[o]nly when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." 481 U.S. at 582 (*Quoting Florida Power*, 417 U.S. at 804-805).

The Board's current policy on indirect coercion still fails to apply the principles set forth in *Royal Electric* and *Florida Power*. The Board's current policy stems from a misapplication of the Court's statement in *Royal Electric* that "when a union has no collective-bargaining relationship with an employer, and does not seek to establish one," that there can be no violation of the Act. *Royal Electric* at 589. The Board's current policy on indirect coercion inverts this statement, to find that where a union disciplines a supervisor and *is* seeking a bargaining relationship that a finding of liability that §8(b)(1)(B) is violated. This mechanistic approach permits the Board to determine liability without connecting the union's conduct with coercion or restraint of the employer's selection of §8(b)(1)(B) representatives. This is contrary to both *Royal*

Electric and *Florida Power* where this Court told the Board that it would take more than simple discipline of a supervisor member to trigger liability under §8(b)(1)(B).

In *Royal Electric*, this Court rejected the theory of indirect coercion. The Court explicitly followed its discussion of "seeking" a bargaining relationship with the disclaimer:

> The assumption...that an adverse effect can occur simply by virtue of the fact that an employer representative is disciplined for behavior that occurs during performance of 8(b)(1)(B) tasks – is not applicable when the employer ***has no continuing relationship with the union.***

Id. at 590 (Citations omitted) (emphasis added). The Court stated that the "the absence of a collective-bargaining relationship between the union and the employer, like the absence of §8(b)(1)(B) responsibilities in a disciplined supervisor-member, makes the possibility that the Union's discipline of [the supervisor] will coerce [the employer] *too attenuated* to form the basis of an unfair labor practice charge." *Id.* at 589.

In a concurring opinion, Justice Scalia in emphasized that "seeking" a bargaining relationship was not a basis for finding restraint and coercion of an employer in its selection of an §8(b)(1)(B) representative. 481 U.S. at 596. He stated that whether or not a union "intend[s] to represent" the employer's employees, the only relevant issue is whether a union has a collective bargaining agreement covering the employees. *Id.* To hold that §8(b)(1)(B) encompasses a situation where there is no collective bargaining relationship ignores the construction of the statute, which "by its terms governs only the relationship between unions and

employers." *Id.* Thus, Justice Scalia would "limit the Board's indirect restraint theory to circumstances in which there is an actual contract between the union and affected employer, without regard to whether the union has an intent to establish such a contract." *Id.* at 597.

The Board in this case has interpreted *all* of Podewils' supervisory duties to implicitly include §8(b)(1)(B) tasks, making it impossible to distinguish between discipline for performance of §8(b)(1)(B) tasks which would be prohibited by the Act and discipline for performance of simple supervisory duties which are not. The Board assumed that all of Podewils' tasks "would *most likely* be contractual grievances if a collective bargaining agreement had been in place." *Int'l Bhd of Electrical Workers, Local 494*, 332 NLRB at 1228. (emphasis added) However, there is no collective bargaining agreement in place between Nell and the Union and there were no contractual grievances for Podewils to adjust. The "protections of §8(b)(1)(B) were not meant to extend to *all* supervisors who happen to adjust grievances, but only to those who do so in the context of a collective bargaining agreement." *N.L.R.B. v. Int'l Bhd of Electrical Workers, Local 1547*, 971 F.2d 1435, 1440 (9th Cir. 1992)(Norris, J., dissenting). Consequently, if there is no collective bargaining agreement, then the supervisor-member cannot be engaged in "collective bargaining" or "grievance adjustment" duties, and there can be no violation of §8(b)(1)(B). *Royal Electric, supra* at 590.

The Board's current interpretation of §8(b)(1)(B) is just as expansive as the prior interpretations rejected in *Royal Electric* and *Florida Power*. In *Florida Power*, the Board overreached by applying §8(b)(1)(B) to all activities of an employer's §8(b)(1)(B) representatives. *Florida Power* at 802-03, 805. In *Royal Electric*, the Board overreached by interpreting "representative" to include all of an employer's supervisors. *Royal Electric* at 577. Here, the Board

overreaches by interpreting "collective bargaining" and "grievance adjustment" to include the duties of supervisors where there is no collective bargaining agreement. The practical outcome for each interpretation is identical; the union may not discipline members so long as they are employed as supervisors. Because this Court has previously stated that such an outcome is not supported by the language of §8(b)(1)(B) the Board has again exceeded the outer limits of its statutory authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

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LEXSEE 2005 U.S. APP. LEXIS 9770

International Brotherhood of Electrical Workers, Local 494, Petitioner/Cross-Respondent v. National Labor Relations Board, Respondent/Cross-Petitioner Joseph G. Podewils; Gerald Nell Inc., Intervenors

No. 04-1177

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2005 U.S. App. LEXIS 9770

May 24, 2005, Filed

[ENTERED: May 24, 2005]

NOTICE: [*1] RULES OF THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Stay denied by *IBEW, Local 494 v. NLRB, 2005 U.S. App. LEXIS 15893 (D.C. Cir., July 29, 2005)*

PRIOR HISTORY: Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board. *IBEW, Local 494, 2004 NLRB LEXIS 154, (Mar. 31, 2004)*

COUNSEL: For INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 494, Petitioner: Matthew R. Robbins, Nathan D. Eisenberg, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, Milwaukee, WI.

For NATIONAL LABOR RELATIONS BOARD, Respondent: Arthur F. Rosenfeld, Aileen A. Armstrong, Deputy Associate General Counsel, John H. Ferguson, Assistant General Counsel, Julie B. Broido, Senior Attorney, Jeffrey Lawrence Horowitz, Attorney, National Labor Relations Board (NLRB), Washington, DC.

For JOSEPH G. PODEWILS, GERALD NELL INC., Intervenors: Kevin J. Kinney, Krukowski & Costello, Milwaukee, WI.

JUDGES: Before: SENTELLE, RANDOLPH, and GARLAND, Circuit Judges.

OPINION:

JUDGMENT

This appeal was considered on the record from the National Labor Relations Board and on the briefs by the parties. The court has determined that the issues presented occasion no need for an opinion. *See D.C. Cir. Rule 36(b)* [*2]. It is

ORDERED AND ADJUDGED that Local 494's petition for review be denied, and that the Board's order be enforced in full.

The Board has held that Section 8(b)(1)(B) of the National Labor Relations Act, *29 U.S.C. § 158(b)(1)(B)*, applies not only in cases where the Union already has a collective bargaining relationship with the employer, but also where the Union lacks such a relationship but is actively seeking such a relationship. Petitioner challenges such a reading of the statute, relying primarily on Justice Scalia's separate opinion in *NLRB v. Electrical Workers, IBEW Local 340 (Royal Electric), 481 U.S. 573, 596, 95 L. Ed. 2d 557, 107 S. Ct. 2002 (1987)* (Scalia, J., concurring in judgment

only). Petitioner's argument cannot succeed, however, because this Court has already endorsed the Board's reading of the statute in a previous appeal.

This Court's statement to that effect could not have been more clear:

> The law governing this case is undisputed. A union violates *8(b)(1)(B)* by disciplining a supervisor who has either collective bargaining or grievance adjusting duties, thereby coercing an employer, only if it has, or is seeking, a collective **[*3]** bargaining relationship with the employer. *See Royal Electric, 481 U.S. at 590.* The Board has not adopted the interpretation of *section 8(b)(1)(B)* Justice Scalia advanced in his Royal Electric concurrence: that the section only applies "to circumstances in which there is an actual contract between the union and affected employer, without regard to whether the union has an intent to establish such a contract." *Id. at 597* (Scalia, J., concurring [in judgment]).

Podewils v. NLRB, 348 U.S. App. D.C. 253, 274 F.3d 536, 539 (D.C. Cir. 2001) (footnote omitted).

That reading is the law of the case. As this Court sitting *en banc* explained in *LaShawn A. v. Barry,* "the *same* issue presented a second time in the *same* case in the same court should lead to the *same* result." *318 U.S. App. D.C. 380, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc)* (emphasis in original). "The doctrine encompasses a court's explicit decisions, as well as those issues decided by necessary implication." *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 258 U.S. App. D.C. 124, 810 F.2d 243, 250 (D.C. Cir. 1987).* Having set forth the rule governing this case once

already, [*4] this Court cannot change its position now. Indeed, to do so in light of *Royal Electric* would be particularly inappropriate, as the Supreme Court accepted the Board's reading in *Royal Electric*, instructing that "union discipline directed at supervisor-members without § *8(b)(1)(B)* duties, working for employers with whom *the union neither has nor seeks a collective-bargaining relationship*, cannot and does not adversely affect the performance of § *8(b)(1)(B)* duties." *481 U.S. at 595* (emphasis added).

Pursuant to *Rule 36* of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See FED. R.APP.P.41(b); D.C. CIR. R. 41.*

Per Curiam

ELECTRICAL WORKERS LOCAL 494 (GERALD NELL)

International Brotherhood of Electrical Workers, Local 494; International Brotherhood of Electrical Workers, Sixth District *and* Joseph G. Podewils *and* Gerald Nell, Inc. Cases 30-CB-4127 and 30-CB-4128

October 31,2000

[ENTERED: October 31, 2000]

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On July 30, 1999, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel, the Charging Parties, and Respondent IBEW Local 494 filed exceptions and supporting briefs, and the Respondents and the Charging Parties filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

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[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that Respondent IBEW Local 494 (Local 494) violated Section 8(b)(1)(B) of the Act by restraining and coercing an employer, Gerald Nell, Inc. (Nell), in the selection of its representatives for the purposes of collective bargaining and grievance adjustment by processing union disciplinary charges against Charging Party Joseph Podewils, and, by disciplining Podewils through the levying of a fine against him.[2] For the reasons below, we reverse and find that Local 494 did not violate Section 8(b)(1)(B).

In October 1997[3] Nell, a nonunion electrical contractor, hired Podewils as its electrical division manager. Although he was informed by Nell that he would have to resign his union membership in Local 494, Podewils failed to take adequate steps to effectuate his resignation.[4]

On December 1, Local 494 business representative, Leon Burzynski, appeared at the offices of Nell after receiving a tip that Podewils was employed by a nonunion contractor. During a brief conversation with Podewils, Burzynski asked "what would be the opportunity of [Podewils] working to organize the company." Podewils replied, "that wouldn't happen here . . . that wouldn't be an option." Burzynski then gave Podewils his business card with his home telephone number written on the back, but, made no further contact with Podewils. Thereafter, Local

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[2] The judge dismissed an allegation that Respondent International Union violated Sec. 8(b)(1)(B).

[3] All dates are in 1997 unless noted otherwise.

[4] As the judge found, Podewils' efforts to resign his union membership were insufficient to constitute an effective resignation. Accordingly, we adopt the judge's dismissal of the 8(b)(1)(A) allegations that the Respondents disciplined Podewils when he was no longer a union member.

494 made no efforts to circulate authorization cards to any employees of Nell; it did not engage in any picketing or handbilling of Nell; nor did it make any efforts of any kind to establish a collective-bargaining relationship with Nell.

On December 15, Burzynski filed intraunion disciplinary charges against Podewils alleging that Podewils was working for a nonunion company, contrary to the obligations of Local 494 members under the provisions of the union's constitution. On February 24, 1998, Local 494 found Podewils guilty of violating the union's constitution and fined Podewils $100,000. Thereafter, on appeal, the fine was reduced by the International Union to $10,000.

Section 8(b)(1)(B) provides that it shall be an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. In *NLRB v. Electrical Workers IBEW Local 340 (Royal Electric)*, 481 U.S. 573, 591 (1987), the Supreme Court reaffirmed the principle that Section 8(b)(1)(B) was intended primarily to prevent a union that is engaged in a long-term bargaining relationship with an employer from dictating the latter's choice of collective bargaining or grievance representatives, or the form that such representation will take.

It follows, therefore, that to violate Section 8(b)(1)(B) a union must, at a minimum, either have a collective-bargaining relationship with an employer, or at least be seeking to have such a relationship. As the Court explained in *Royal Electric*, a union has no incentive to affect a supervisor-member's performance of collective-bargaining or grievance adjustment duties, or to influence an employer's choice of representative, in the absence of either a collective-bargaining relationship or a desire to establish such a relationship. Id. at 590.

The Board has recognized that the requirement that a union must be "seeking" a collective-bargaining relationship (when no on-going collective-bargaining relationship exists) is to be interpreted narrowly. See *Carpenters District Council of Dayton (Concourse Construction Co.)*, 296 NLRB 492, 493 (1989). Further, "[t]here must be evidence not only of an actual intent to seek recognition, but the union must currently be seeking recognition." Id. at 493. In the present case, we find that the evidence is insufficient to establish that Local 494 was actively seeking a bargaining relationship within the meaning of *Royal Electric*.

As noted, Local 494 engaged in no overt organizational or recognitional activity—no solicitation of authorization cards, no picketing or handbilling, and made no demand for recognition.[5] This leaves only Burzynski's inquiry to Podewils about the possible "opportunity" of organizing, which Podewils, in response, immediately dismissed out of hand. We find that this inquiry, standing alone, falls short of the kind of concrete evidence necessary to show that a union is currently and actually seeking to establish a collective-bargaining relationship under *Royal Electric*. Put another way, Burzynski's inquiry is simply too preliminary and attenuated in character, in the absence of other evidence, to warrant an inference that the discipline imposed on Podewils would affect, or was intended to

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[5] For these reasons, the present case is distinguishable from *Electrical Workers IBEW Local 1547 (Veco, Inc.)*, 300 NLRB 1065 (1990), enfd. 971 F.2d 1435 (9th Cir. 1992). There, the Union admitted that it was "presently trying to organize" the Employer and the Union's desire for a collective-bargaining relationship was overtly manifested in activities such as gathering unit employees' names and attempting to speak with them.

affect, the manner in which Podewils performed collective-bargaining or grievance adjustment duties.[6]

As the Supreme Court noted in *Royal Electric*, Section 8(b)(1)(B) is not intended to prevent enforcement of union rules that have only the incidental effect of making a supervisory position less desirable. Because Podewils retained his union membership while serving as an 8(b)(1)(B) representative for Nell, he incurred obligations to both the Union and the Employer. As the Court explained in *Royal*, an employer is not coerced in the selection of its representatives merely because a supervisor–member having dual loyalties may find the supervisory position less desirable when faced with the uniform enforcement of legitimate union rules. 481 U.S. at 591– 595.

Our dissenting colleague contends that the Union's "real intent" when disciplining Podewils was to pressure him to organize for the Union and that this serves to establish that the Union was actively seeking a bargaining relationship. But, as the dissent itself points out, Burzynski, when speaking to Podewils, did not link any reference to "organizing," or a refusal to organize, to impending

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[6] In finding that Burzynski's inquiry sufficed to establish that Local 494 had a concrete interest in representing the Employer's employees, the judge relied on *Plumbers Local 597 (Songer Corp.)*, 308 NLRB 733 (1992). In that case, however, the Board found, as we do here, that the evidence failed to show a current recognitional objective. Nor in our view is the requisite current and active recognitional intent established by Burzynski's testimony that, if the Employer were organized, he would not have filed charges against Podewils. Without more, that testimony has an obvious and entirely lawful meaning, namely, that Podewils would not be violating the Union's lawful rules against working for nonunion employers if his employer were unionized. Accordingly, that testimony is insufficient to satisfy the General Counsel's burden to prove the elements of an 8(b)(1)(B) violation by a preponderance of the evidence.

discipline. Thus, there was no hint of retaliation when the reference to organizing was made.

Further, contrary to the dissent, we draw no inference of an improper retaliatory purpose simply because Burzynski elected to verify union member Podewils' employment with a nonunion employer by a personal visit rather than by a telephone call, nor do we draw such an inference because Burzynski left a business card that included his written home telephone number. In our view, this conduct is consistent with Burzynski's responsibility as a business representative to communicate with constituent members, such as Podewils, and to investigate possible violations of union rules as occurred here by virtue of Podewils' employment with a nonunion employer.

Finally, as noted above, *Royal Electric* calls for a restrictive and narrow interpretation of the "seeking a collective-bargaining relationship" requirement under Section 8(b)(1)(B). To that end, and in the absence of any overt organizational or recognitional activities by the Union here, we discern no persuasive basis to broadly infer such a purpose in this case, as does our dissenting colleague, solely on the basis of the preliminary and vague inquiry made by Burzynski about the possibility of organizing or by his conduct accompanying the inquiry.

Accordingly, we find that the Respondents did not violate the Act, and we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER HURTGEN, dissenting in part.

Unlike my colleagues, I would affirm the judge's finding that Respondent Local 494 violated Section 8(b)(1)(B) of the Act. My colleagues do not dispute the judge's finding that Charging Party Podewils was engaged in 8(b)(1)(B) activities. They dismiss the 8(b)(1)(B) allegation primarily because they find that the evidence is insufficient to establish that Local 494 was seeking a bargaining relationship with Nell. I disagree.

The facts are that Respondent's (Local 494) business representative, Burzynski, asked Employer Manager Podewils to assist Respondent in seeking to organize the Employer. Podewils responded that he would not do so. Two weeks later, Burzynski filed disciplinary charges against Podewils, and Respondent then fined Podewils.

Based on these facts, as found by the judge, it is clear that Respondent: (1) was seeking to organize the Employer's employees (i.e., seeking to establish a collective-bargaining relationship; (2) was seeking to use Podewils as its organizer; and (3) disciplined Podewils because he refused to go along.

As to point 3, Respondent argues that it disciplined Podewils simply because he was working for a nonunion firm. However, the facts show that Local 494 Business Representative Burzynski filed his intraunion disciplinary charges against Podewils only 2 weeks after Podewils rejected Burzynski's request that Podewils organize Nell. As the judge noted, Burzynski's question to Podewils belied Burzynski's testimony that he went to Nell's premises simply to verify the accuracy of the tip he had received that Podewils was working for the nonunion Nell. Nor did Burzynski tell Podewils that he was impermissibly working for a nonunion employer or ask him why he was doing so. I also note the judge's finding that Burzynski's attempt to explain away his damaging inquiry was "lame." ("I felt I

needed a reason to be there and that was a legitimate question.") If the Union's real intent had been simply to charge Podewils with violating its constitution (by working nonunion), rather than to pressure him to help in organizing, it could have verified his employment at Nell with a simple phone call. Further, Burzynski's giving Podewils his business card with his home telephone number written on the back is logically explicable as an action taken in the hope that Podewils would change his mind (or have it changed for him by the subsequent discipline). In any event, this action by Burzynski is not consistent with the notion of merely verifying employment.

My colleagues say that Burzunski, when speaking to Podewils, did not link Podewils' refusal to organize to any impending discipline. They also say that there was no mention of retaliation when the reference to organizing was made. From these observations, they conclude that the discipline was not motivated by the refusal to organize. I disagree with this reasoning. It is the rare case when a party (union or employer) admits motive to the victim. Rather, as in any other "motive" case, the result turns on an analysis of all the circumstances. As set forth above, I believe that the circumstances clearly support a finding of improper motive. In this regard, the finding is not based "simply" on the fact that Burzynski went to see Podewils in person and left him his business card. Nor is it "solely" based on the fact of Burzynski's inquiry to Podewils about organizing. Rather, my view is based on the totality of the circumstances.

I also note Burzynski's testimony that if Nell were organized, he would not have filed charges against Podewils. My colleagues seek to explain away that testimony. They say that if Nell were organized, i.e., if it were unionized, Podewils would no longer be working for a nonunion company. If that testimony were the only piece of relevant evidence, I might agree with them. However, in all the

circumstances of the instant case, set forth above, I would not give the most innocent conceivable interpretation to that testimony.

Nor do I agree with my colleagues that this case can accurately be described as one in which enforcement of union rules has had merely the incidental *effect* of making a supervisory position less desirable. As discussed above, *the purpose* of the fine was to coerce Podewils to help Respondent Local 494 in its effort to organize Nell. That purpose was clearly contrary to what Nell wanted and expected from its manager-representative. I therefore agree with the judge's finding that the fine was intended to adversely effect Podewils in the performance of his Section 8(b)(1)(B) duties.

Accordingly, the requirement of *Royal Electric* (union has, or is seeking, a bargaining relationship) is satisfied.

Miann B. Navarre, Esq. and *Joyce Ann Seiser, Esq.*, for the General Counsel.

Matthew Robbins, Esq. and *Jonathan M. Conti, Esq. (Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.)*, of Milwaukee, Wisconsin, for Local 494.

Elihu I. Leifer, Esq. (Sherman, Dunn, Cohen, Leifer & Yellig, P.C.), of Washington, D.C., for the International.

Kevin J. Kinney, Esq., and *Heather L. MacDougall, Esq. (Krukowski & Costello S.C.)*, of Milwaukee, Wisconsin, for the Charging Parties.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. On February 24, 1998, Respondent, International Brotherhood of Electrical Workers, Local 494 (Local 494 or Local) fined Charging Party, Joseph G. Podewils $100,000, ostensibly for working in a nonunion shop. On July 24, 1998, Respondent, International Brotherhood of Electrical Workers, Sixth District (International, the International Brotherhood of Electrical Workers being referred to as the Union) sustained the violations found by the Local, with one exception, but reduced the fine to $10,000, even though Podewils, he says, had resigned from membership in the Local. That the complaint alleges, violates Section 8(b)(1)(A) and (B) of the National Labor Relations Act, 1947, as amended, 29 U.S.C. § 151 et seq. Respondents claim that Podewils never resigned and that their fines were lawful.[1]

Jurisdiction is conceded. Charging Party, Gerald Nell Inc. (Employer), a Wisconsin corporation, has been operating as a contractor and developer based in Waukesha, Wisconsin. During the year preceding the issuance of the complaint, it purchased and received goods and services valued in excess of $50,000 directly from sources outside Wisconsin. I conclude that the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that both Respondents are labor organizations within the meaning of Section 2(5) of the Act.

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[1] The relevant docket entries are as follows: The charges were filed on May 27, 1998. The charge in Case 30-CB-4127 was amended on November 6, 1998; but the complaint was issued on August 13, 1998, and was not amended. This hearing was held in Milwaukee, Wisconsin, on April 22, 1999.

In October 1997, the Employer, a nonunion firm, hired Podewils as a replacement for the manager of its electrical division. Mike Nell, its president, told Podewils that he must resign from Local 494. Podewils agreed; and, when Podewils called on October 20 to say that his then employer did not want 2 weeks' notice and that he was ready to start with the Employer, he added that he wanted to take the rest of the week off so that he could take care of various matters, including his resignation from Local 494. Podewils called in the middle of that week to advise that he had indeed resigned; and on October 27, Podewils reported to work, presenting Nell with an unsigned honorary withdrawal card from the Union and a resignation letter which read:

> 10-22-97
>
> Attn-
>
> IBEW Local 494
>
> As of this date Oct. 22, 97, I am terminating all previous membership with Local 494 and the IBEW.
>
> [sgd.] Joseph G. Podewils

Podewils testified that he mailed this resignation on October 22, but Local 494 denied that it ever received it. Instead, the Local insists that all that it ever received was an application for an honorary withdrawal card, a card that Podewils admitted that he originally, albeit mistakenly, filled out a form for. When Podewils was told by Nell that he had to resign, he went home and "carefully" examined the union constitution. Podewils testified that he did not know how to resign. All that he could find about "resignation" were provisions that pertained to withdrawal, which, as will be seen, had quite different ramifications. So, on October 22, Podewils went to the Local's office and, assuming (he testified) that the only way out of the Union

was by "withdrawing," asked for a withdrawal card.[2] Local 494 business representative, Dave Miller, asked Podewils what he would be doing and where he was going. Podewils replied that the information was confidential. Although Miller had been informed of the rumor that Podewils was going to work for a nonunion employer and, thus, knew that a withdrawal card was not the proper procedure for that situation, Miller provided Podewils with paperwork to receive a withdrawal card. Contrary to the testimony of another Local 494 business representative, Leon Burzynski, no one advised Podewils that, by withdrawing, he would be violating the union constitution by working for a nonunion employer, such as the Employer, but by resigning, he would be free to work for anyone. The Local's witnesses uniformly testified that they had no duty to do so. All Podewils was told was that he would be relinquishing some of his pension credits; and he knew from reading the constitution (and he was also told by Local 494 business manager, Paul Welnak), that, by withdrawing, he was remaining subject to union charges, trial, and appropriate penalty.

Podewils signed an application for a withdrawal card, specifically checking the portion of the application which was for an honorary withdrawal card, which stated that it applied to members who retired from the trade or were unemployed, rather than a participating withdrawal card that was for members who retired from the trade, or

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[2] Counsel for the International asked Podewils: "Why did you go down there and say to him ' need to sign a withdrawal card?" Podewils answered: "Because at that time I believed that that was what I was going to be processing and doing based on my interpretation of this constitution." I asked whether it was true that, when he went to the union, he did not say "I would like to resign," but said "I want a withdraw[al] card." Podewils agreed. No one objected or excepted to the following quotation read from Podewils' investigatory affidavit: "I went down to the union hall and I spoke to a male business agent about the fact that I needed a union withdrawal card."

were unemployed, or were going into management and desired to maintain membership in the Union. Podewils knew that he was going to remain in the trade, but nonetheless signed the back of an honorary withdrawal card and returned it to the clerk for processing.[3]

Later on October 22, after he had picked up the forms from Local 494 showing that he had withdrawn, Podewils talked with Roger Kastanak, an old acquaintance, to advise him that he had left his job and had taken a withdrawal card from the Local. Kastanak did not think that that was the correct procedure and asked his associate, Bob Mueller, to get on the phone. Mueller said that he had his employees resign either by mail or drop off the resignation at the Local. As a result, Podewils testified, he prepared the resignation letter, quoted above, and mailed it. Unfortunately, he mailed it by regular mail, so there is no proof, either a receipt by the post office or a return receipt by Local 494, to corroborate his oral testimony.

Burzynski found out that Podewils was working for the Employer. On February 6, 1998,[4] he charged that Podewils had violated five sections or subsections of the union constitution, all purportedly dealing with his work for a nonunion contractor. The hearing was set for February 18; and, instead of showing up and proving that he had resigned or even advising the Local that he had resigned, Podewils decided, with Nell's concurrence, not to attend the hearing because he was not a member of the Union. So there is nothing to show, at the beginning of the Local's disciplinary proceeding against him, that he was taking the position that he had resigned.

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[3] Podewils related that his visit to the Union occurred on 2 days. It seems more likely that he completed his application on 1 day, as Burzynski testified.

[4] All dates hereinafter refer to 1998, unless otherwise indicated.

The next event was the hearing's aftermath, the February 24 finding by Local 494 of guilt and the issuance of a $100,000 fine, served on Podewils. Podewils sought Nell's assistance, and Nell referred him to his corporate counsel, Todd Esser. Podewils met with him, explained his dilemma, and gave him (Podewils testified) a copy of his resignation letter, quoted above. Esser then referred Podewils to yet another attorney, an employment law specialist, George Erwin, with whom Podewils also consulted and also (Podewils testified) gave him a copy of the same resignation letter. Erwin then prepared an appeal for him to sign, which Podewils signed on March 4 stating, in part, as follows:

> That my continued membership in the Union is not voluntary. In October of 1997 I requested a termination of my membership status. In response, this Local required me to sign a withdrawal form which I signed under the reasonable expectation that I was ending my affiliation with the Union subject only to my vested pension rights. It is the apparent position of the Local Union that the requirement that I sign this form continued the Union's jurisdiction over me, my future employment endeavor and my obligation to comport with the Union Constitution including engaging in actions that they view as detrimental to their economic well-being. This requirement imposed on my separation from Union affiliation is unconstitutional, constitutes an unfair labor practice, violates my freedom of association, is penal in nature and tortiously interferes with my existing contract rights with my new employer.

This letter is based on facts which preceded Podewils' phone call with Kastanak and Mueller. The letter represents that Podewils "terminate[d] . . . [his] membership status." Conspicuously missing from the letter is the word

"resign" or "resignation" or any of the facts that Podewils testified to relating to his actions *after* going to the Local's office to "withdraw." Missing was any reference to the act that Kastanak and Mueller believed so important that they advised Podewils to send in a specific letter to the Local advising that he resigned. Missing also is an allegation that Podewils followed that advice and sent the resignation. All that appears in this letter is that Podewils went to the Local's office and the Local forced him to take a "withdrawal," which Podewils conceded was erroneous, because he was not required to accept the withdrawal card. Indeed, in his phone conversation, Podewils never complained to Kastanak that he had been forced or misled into withdrawing. Rather, he told Kastanak that he thought that he was resigning. Indeed, his own testimony demonstrates that getting the honorary withdrawal card was his idea, and he knew that by so doing he was remaining attached to the Union and was "subject to charges, trial and appropriate penalty in accordance with provisions of" the union constitution. In sum, Podewils knew that he was receiving a voluntary honorary withdrawal and was not resigning from the Union.

It was that knowledge that he imparted to Erwin, and it was that representation that Podewils made in the March 4 letter that he signed. In another letter, dated March 30, sent by Erwin, the specific factual assumption is that Podewils withdrew (not resigned) from the Union. Thus, Erwin "once again reiterate[d] on behalf of Joe Podewils that he has previously stated his intention to withdraw of [sic] this Union" and asked the Union to provide the following:

1. Name, address and, if available, telephone number of all individuals who were previous members of the Local Union 494 who have withdrawn from active union membership, either voluntarily or involuntarily within the last two years.

2. With respect to all members who have withdrawn based on employment with a nonunion employer, all actions taken by Local Union 494 in regard to these employees including fines or other action taken.

Clearly, Erwin was under the assumption that Podewils had taken a withdrawal card and had not resigned. Had it been otherwise, Erwin would not have repeatedly used the word "withdraw" and would have attached a copy of the resignation letter to his earlier appeal. Podewils' testimony that he told Erwin that he had resigned and that he gave him a copy of the letter could not be true. The fact that Erwin was not called as a witness, nor was Esser, only reinforces the fact that Podewils never sent his letter to the Local. I reject the General Counsel's attempt to blame Erwin for the failure to reference the resignation.

The Local's procedure required that it obtain the approval of its membership for the issuance of any withdrawal card. Podewils' application was approved at a membership meeting held on November 6, 1997, and his honorary withdrawal card was mailed to him the next day. Although Podewils received it, he did nothing. In particular, he did not write to the Local or telephone to advise that he should not have been sent an honorary withdrawal card because he had resigned, yet another indication that he in fact did not resign.

The Local keeps records of all the resignations it receives, as well as all applications for honorary withdrawal cards. Membership action is required for the issuance of the cards, but is not for resignations. However, the Local's president reports to the membership at each membership meeting the names of the persons who have resigned. Podewils' application for a withdrawal card was received and acted on by the membership. There is no record that the Local received a resignation from him, although there are substantial records that it received resignations from others and reported them to the membership. Furthermore, there is nothing in the record that indicates that the Local has any proclivity to deny, no less than any experience in denying, resignation requests.[5] Accordingly, I find no evidence that Podewils resigned from the Local[6] or that the Local took any disciplinary action against him knowing that he had resigned. It follows that regarding the alleged violation of Section 8(b)(1)(A), the International did not violate the Act because there is no primary liability on the part of the Local, and because there is no proof that in the appeal to it the International had any notice from Podewils that he had resigned (or had attempted to resign). All there was in the record before it was that Podewils had applied for an honorary withdrawal card and then gone to work at a

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[5] In August 1998, while this proceeding was pending, the Local received a copy of Podewils' resignation letter; but Welnak did not process it. The lawfulness of not accepting the resignation at that time is not before me.

[6] I fully recognize that this finding may appear, on its face, troubling. As Podewils argues, he received the advice from Kastanak and Mueller, he told Nell that he had resigned, and he filed his resignation form with Nell. On the other hand, every time that Podewils had an opportunity to assert to the Local or the International that he had resigned, he did not do so—either when he received his withdrawal card, or the internal Union hearing was scheduled, or after it was held, in his appeals to the International. And despite Podewils' claim that all he received from his efforts was the loss of his pension, there was something to gain in the issuance of the withdrawal card: if his new job did not work out, he could return to membership in the Local without paying a new initiation fee.

nonunion facility. On that basis, the International found that he had violated its constitution, although not in all the respects found by the Local's trial board, and reduced the fine.

The complaint also alleges that Respondents fined Podewils in violation of Section 8(b)(1)(B), which makes it an unfair labor practice for a union or its agents "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Burzynski testified that he received an anonymous tip in November 1997 that Podewils was working for the Employer, so Burzynski confronted Podewils there on December 1, 1997, by asking "what would be the opportunity of [Podewils] working to organize" the Employer. Podewils said that that would not happen there and would not be an option.[7] Burzynski gave Podewils his business card, with his home telephone number written on the back. On cross-examination, Burzynski admitted that, if the Employer were organized, he would not have filed charges against Podewils. What was left unsaid was that, if the Employer was organized, Podewils would no longer be working for a nonunion company.

Burzynski testified that his sole purpose of being at the Employer's premises was to ensure the accuracy of his information that Podewils was working there; but his question to Podewils belies that testimony. Burzynski testified that, when Podewils came to the Local's office to apply for his withdrawal card, he "reminded him that if he was going to stay in the electrical field that he . . . would not be able to be eligible to receive a withdrawal card." Instead of telling Podewils at the Employer's office that he was

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[7] This is Podewils' recollection. Burzynski's was not much different: In his statement to the Local's trial board, he stated that he asked if there was any possibility of the Employer's electrical division becoming Union. Podewils said: "No. I don't think so," and Burzynski replied: "I'm sorry about that. I'm disappointed."

misusing his withdrawal card because he was not eligible for it, as (he testified) he had told him previously,[8] or asking what Podewils was doing there, after he had taken out a withdrawal card, Burzynski asked him to organize. What he was really doing was using Podewils' application for a withdrawal card to apply pressure to organize the Employer. And, when Podewils refused to commit himself, Burzynski filed his charges on December 15, 1997, later explaining to the trial board that Podewils had said that there was no chance that the Employer's electrical division would ever be unionized, that "Podewils has already been responsible for $268,000 of electrical work that should have been done union," that the "first objective [of the Union constitution] is to organize all electrical workers," and that Podewils's moving to the Employer "is in opposition to that" objective.

The following must be shown to establish an 8(b)(1)(B) violation: (a) that Podewils was engaged in 8(b)(1)(B) activities; (b) that Local 494 was seeking to unionize the Employer's employees; and (c) that the $100,000 fine was intended to adversely affect Podewils in the performance of his Section 8(b)(1)(B) duties. *NLRB v.*

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[8] Burzynski's failure to say this (as well as the fact that none of Burzynski's notes support such a conversation) makes me disbelieve that testimony. In addition, I find lame his attempt to explain away his damaging question asking Podewils to organize for him: "I felt I needed a reason to be there and that was a legitimate question." As shown, above, Burzynski could have legitimately mentioned Podewils' violation of the conditions of his withdrawal card. Finally, as the counsel for the General Counsel points out in her brief, if the Local's real intention was to charge Podewils with a violation of the Union constitution, rather than retaliating against him for not assisting in organizing, it could have verified Podewils' employment at the Employer by a quick phone call after learning, as Burzynski testified that he did, that Podewils was employed there the first or second week of November 1997. Finally, I find that Burzynski's giving Podewils his business card was not an empty gesture. Podewils had the opportunity to call Burzynski, in case Podewils changed his mind.

Electrical Workers Local 340, 481 U.S. 573, 585-589 (1987); *NLRB v. Electrical Workers Local 1547*, 971 F.2d 1435, 1436 (9th Cir. 1992), enfg. 300 NLRB 1065 (1990). Podewils was engaged in 8(b)(1)(B) activities. He was responsible for running the Employer's electrical division, doing his own estimating, purchasing his own materials, and scheduling his employees on a daily basis, deciding where they were going to go, who was going to work with whom, and how long they were going to be working there. He settled all grievances or disputes that arose among these employees, such as when one had a personality conflict with another employee (he moved Shaun Zaskowski, who had complained about another employee he was working with), when an employee wanted a day off, and when they felt they were not being paid properly (he granted pay increases to employees Zaskowski, Steve Roblee, and Roger Pozorski, after they complained about their pay rates). He had the independent authority to hire and fire, to give wage increases, and to lay off employees.[9] The Board has found, in *Plumbers Local 60 (ITMC Corp.)*, 299 NLRB 401 (1990), that supervisors' handling of payroll disputes in a nonunion operation were exactly the type of disputes that would most likely be contractual grievances if a collective-bargaining agreement had been in place.[10] See also *Electrical Workers 1547 (Veco, Inc.)*, 300 NLRB 1065 (1990).

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[9] He had no authority, however, to change benefits which applied generally to not only the employees in his department but also the other employees of the Employer.

[10] Because the Employer hired Podewils as a supervisor and he had not resigned from membership in the Union, Podewils was not an employee within the meaning of Sec. 8(b)(1)(A) of the Act from the date that he first reported to the Employer. Local 494 agrees that he was a supervisor, but disagrees that he was an 8(b)(1)(B) grievance adjuster. Despite the fact that Podewils had not, until later, exercised any of the powers that he had to adjust grievances, Nell, when he hired Podewils, had invested him with those grievance-adjustment powers and functions by giving him full charge of his own crews.

Despite that fact that, here, there is no strike, stoppage, direct demand for recognition, or other evidence frequently relied on by the Board to find violations, one cannot disregard what Burzynski said to Podewils when they met at the Employer's office. Burzynski asked Podewils to organize the employees, a specific statement indicating the Local's concrete interest in representing the Employer's employees. *Plumbers Local 597 (Songer Corp.)*, 308 NLRB 733, 733-734 (1992). When Podewils refused, Burzynski filed his charge against Podewils. The union constitution provided that a withdrawal card could be annulled for working with nonmembers of the Union to perform electrical work, a remedy that Local 494 never even considered. Instead, the pressure that was intended to be applied was not a mere slap on the hand. The Local's fine was well in excess of Podewils' yearly salary as a supervisor. Certainly, it was 10 times as much as the International finally agreed on appeal was a reasonable amount for discipline. It may fairly be asked the reason for such a fine, if not to coerce Podewils to do something for the Local, and that was to help the Local in organizing, an effort that was obviously contrary to what the Employer wanted when Nell demanded that Podewils resign from the Local. In this sense, I find that the $100,000 fine was intended to adversely affect Podewils in the performance of his 8(b)(1)(B) duties. Accordingly, I conclude that Local 494 violated the Act.

I do not find that the International is liable for the Local's violation. The International and Local 494 are separate entities and the International is not automatically responsible for the acts of its affiliate. *Coronado Co. v. Mine Workers*, 268 U.S. 295, 299 (1925), *Electrical Workers Local 5 (Franklin Electric)*, 121 NLRB 143, 146-148 (1958). The Employer and Podewils rely on a theory of agency to hold

the International responsible. Their citations[11] deal solely with situations in which the local or locals were helping to administer contracts that had been entered by the certified bargaining agent, the higher union body. Here, there is no basis for finding that the International had knowledge that the appeal was based on anything other than Podewils's alleged resignation. Thus, liability under *Plumbers Local 589 (L & S Plumbing)*, 294 NLRB 616, 621 fn. 1 (1989); and *Bricklayers (McCleskey Construction)*, 241 NLRB 898, 899 (1979), cited by the Employer and Podewils, is unwarranted.

REMEDY

Having found that Local 494 has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that Local 494 rescind and remove from its records all disciplinary action brought against Podewils, including refunding to him any fines that have been paid to the Local,[12] with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and notify Podewils that this has been done. I shall also recommend that Local 494 make Podewils whole for all legal and other expenses he incurred as a result of Local 494's unfair labor practice. *Operating Engineers Local 150 (Harsco Corp.)*, 313 NLRB 659 fn. 3 (1994), enfd. 47 F.3d 218 (7th Cir. 1995). Finally, I shall also recommend that the Local request the International to rescind its approval of Local

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[11] *Reading Anthracite Co.*, 326 NLRB 1370 (1998); *Mine Workers District 17 (Joshua Industries)*, 315 NLRB 1052, 1063-1064 (1994), enfd. mem. 85 F.3d 616 (4th Cir. 1996); *United Mine Workers (Garland Coal)*, 258 NLRB 56, 59 (1981), enfd. 727 F.2d 954 (10th Cir. 1984).

[12] Podewils has been paying Local 494 $40 each month.

494's discipline of Podewils and remove all references to such discipline from its records.[13]

[Recommended Order omitted from publication.]

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[13] After the hearing, the International moved for admission into evidence its Exhs. 1-5. There being no opposition, the motion is granted.

LEXSEE 274 F.3D 536

JOSEPH G. PODEWILS AND GERALD NELL INC., PETITIONERS v. NATIONAL LABOR RELATIONS BOARD, RESPONDENT INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 494, INTERVENOR

No. 00-1505

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

348 U.S. App. D.C. 253, 274 F.3d 536; 2001 U.S. App. LEXIS 27254; 169 L.R.R.M. 2177; 145 Lab. Cas. (CCH) P11,175

November 13, 2001, Argued
December 28, 2001, Decided

[ENTERED: December 28, 2001]

SUBSEQUENT HISTORY: [**1] As Amended February 6, 2002. On remand at *IBEW, Local 494, 2004 N.L.R.B. LEXIS 154* (Mar. 31, 2004)

PRIOR HISTORY: Petition for Review of an Order of the National Labor Relations Board

IBEW, Local 494, 2000 NLRB LEXIS 795, 332 N.L.R.B. No. 112, 166 L.R.R.M. (BNA) 1010, 2000-1 NLRB Dec. (CCH) P 15704 (2000) IBEW, Local 494, 332 N.L.R.B. 1223, 2000 N.L.R.B. LEXIS 795 (2000)

DISPOSITION: Lower court finding was not supported by substantial evidence therefore petition for review was granted. Determination that intervenor did not violate

section 8(b)(1)(A) of the National Labor Relations Act was rejected.

LexisNexis(R) Headnotes

COUNSEL: Kevin J. Kinney argued the cause for petitioners. With him on the briefs was Gene M. Linkmeyer.

Steven B. Goldstein, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were Arthur F. Rosenfeld, General Counsel, John H. Ferguson, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and Julie B. Broido, Supervisory Attorney.

Matthew R. Robbins argued the cause for intervenor. With him on the brief was Jonathan M. Conti.

JUDGES: Before: EDWARDS and TATEL, Circuit Judges, and SILBERMAN, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

OPINIONBY: SILBERMAN

OPINION: [*538]

SILBERMAN, *Senior Circuit Judge*: Joseph G. Podewils and Gerald Nell Inc. petitioned for review of the National Labor Relations Board's determination that Local 494 of the International Brotherhood of Electrical Workers (the Local) did not violate section 8(b)(1)(B) of the National Labor Relations Act n1 by fining its member Podewils $ 100,000 after he went to work as a supervisor at Gerald Nell. The Board's decision turns on its finding of fact [**2] that the Local was not seeking a collective bargaining relationship with the company when it processed an internal charge

against Podewils. That finding is not supported by substantial evidence and therefore we grant the petition for review.

n1 *29 U.S.C. § 153 et seq.* (2001).

I.

This case involves the limits on a union's ability to discipline a member who is also performing labor relations supervisory functions. Podewils was a rank-and-file member of the Local from 1976 to 1997, when he went to work as a manager -- running the electrical division -- for Gerald Nell Inc. (a nonunion shop). Before beginning work at Gerald Nell, Podewils went to the Local's office twice in October 1997 and filled out an honorary withdrawal card, informing Leon Burzynski, a business representative for the Local, that he was withdrawing for personal reasons. From October to December 1997, Burzynski, acting on an anonymous tip that Podewils was working at Gerald Nell, sought him out. On December 1, 1997, Burzynski [**3] went to the company's offices to find Podewils; he claimed his intention was to verify that Podewils was working there. But the ALJ refused to credit Burzynski, since he could easily have verified Podewils' employment by a phone call. Burzynski, instead of pursuing the issue whether Podewils could legitimately withdraw from the Union, asked: "Is there any possibility you being here means that the electricians here might become union." Podewils responded "that wouldn't happen here ... that wouldn't be an option." Burzynski gave Podewils his business card with his home phone number written on the back, which the ALJ found was for the purpose of giving Podewils an opportunity to change his mind. The business representative then went back to his car and immediately drew up an internal charge against Podewils for violating several provisions of the I.B.E.W. Constitution -- one violation was for working for a nonunion employer while still a member of the Union.

Podewils did not call Burzynski and the latter filed charges with the Local two weeks later.

Two months after that, the Local informed Podewils by letter that he had been charged with violating the I.B.E.W. Constitution. After a [**4] hearing, to which Podewils was invited but did not attend, the Local informed him that he had been found guilty and assessed a fine of $ 100,000. Burzynski testified that the penalty was proper because Podewils had already been responsible for over $ 250,000 of work that should have been "done union." Podewils sought counsel after receiving notice of the fine and appealed to the International, which reduced the fine to $ 10,000, based on Podewils' salary and the period of time he had worked for Gerald Nell as opposed to the amount of union work allegedly lost.

Petitioners then filed unfair labor practice charges against the Local and the International alleging a violation of section 8(b)(1)(A), which makes it unlawful for a labor organization or its agents "to restrain or coerce ... employees in the exercise of the rights guaranteed in section 157 of this title[,]" for disciplining Podewils after he resigned from the Union and also [*539] a violation of 8(b)(1)(B), which makes it unlawful "to restrain or coerce ... an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances...." *29 U.S.C. § § 158*(b)(1)(A), [**5] (b)(1)(B).

The ALJ rejected petitioners' contention that Podewils had effectively resigned from the Union, so he concluded the Local did not violate section 8(b)(1)(A) of the Act. He found that there was no credible evidence to support Podewils' contention that he mailed the Local a resignation letter it did not receive. Turning to the section 8(b)(1)(B) allegation, and applying the three-part test set out in *NLRB v. Electric Workers IBEW Local 340 (Royal Electric), 481 U.S.*

573, 585-89, 107 S. Ct. 2002, 95 L. Ed. 2d 557 (1987), the ALJ made the following three findings: Podewils was a section 8(b)(1)(B) "grievance adjuster"; the Local was seeking to unionize Gerald Nell's employees; and the $ 100,000 fine was intended to adversely affect Podewils in the performance of his section 8(b)(1)(B) duties. The ALJ recommended dismissal of all allegations against the International.

The general counsel, petitioners and the Local all filed exceptions. The Board adopted the ALJ's recommended dismissal of the 8(b)(1)(A) allegation as well as the dismissal of the charges against the International. But the Board reversed the ALJ's finding that the Local was seeking a contractual relationship with Gerald Nell. The **[**6]** Board purportedly found no basis for disputing the ALJ's credibility findings but thought the *only* evidence supporting the general counsel's contention that the Local was seeking a collective bargaining relationship with Gerald Nell was Burzynski's inquiry. And that remark "standing alone, falls short of the kind of concrete evidence necessary to show a union is currently and actually seeking ... a collective bargaining-relationship." Member Hurtgen dissented. Petitioners contest only the Board's determination that the Local did not violate 8(b)(1)(B).

II.

The law governing this case is undisputed. A union violates 8(b)(1)(B) by disciplining a supervisor who has either collective bargaining or grievance adjusting duties and thereby coercing an employer only if it has, or is seeking, a collective bargaining relationship with the employer. *See Royal Electric, 481 U.S. at 590.* n2 The Board has not adopted the interpretation of section 8(b)(1)(B) Justice Scalia advanced in his *Royal Electric* concurrence: that the section only applies "to circumstances in which there is

an actual contract between the union and affected employer, without regard to whether [**7] the union has an intent to establish such a contract." *Id. at 597* (Scalia, J., concurring). The Board has said that in the absence of an existing collective bargaining relationship "the evidence must show that the union engaged in specific overt acts such as picketing or hand-billing for recognition, soliciting authorization cards, *or making statements to an employer indicating a concrete interest* in representing the employer's employees, as opposed to a long-term objective of organizing employees generally." *Plumbers Local 597, 308 N.L.R.B. 733, 733-34* [*540] *(1992)* (emphasis added). The Board did not purport to alter this articulation of the applicable legal standard. Instead, the Board, reversing the ALJ, found that the Local was not in fact actually seeking a collective bargaining relationship with Gerald Nell -- Burzynski's statement was not sufficiently "concrete" -- and petitioners claim its finding lacks substantial evidence on the whole record.

> n2 The Supreme Court's opinion carefully limiting 8(b)(1)(B) to the case of a union that has or is seeking a collective bargaining relationship with an employer is in part based on the premise that a union member -- particularly a supervisor -- has "a right to resign from a union *at any time* and avoid imposition of union discipline." *Royal Electric, 481 U.S. at 595* (emphasis added). This case suggests it may not always be that easy. The ALJ found that each Local office worker testified that he or she was under no obligation to explain to Podewils he should resign, not withdraw.

[**8]

So much would appear straightforward. But counsel for the Board and for the intervening Local have sought to

divert our attention. The Board argues extensively in its brief that its finding that Podewils did not resign from the Union is entitled to deference, despite the fact that petitioners explicitly do not challenge that finding and the resulting determination that the Local did *not* violate 8(b)(1)(A). At oral argument the Board's counsel also suggested that the discipline meted out to Podewils was not really designed to impact the employer's selection of a grievance adjuster (although just how Podewils could manage the electrical division without the ability to adjust grievances seems obscure). Yet the Board did not even suggest that ground in its decision.

The intervenor, for its part, argued that Podewils should not really be considered a grievance adjuster presumably because that term should be limited to grievances that arise out of a collective bargaining relationship. *See Royal Electric, 481 U.S. at 588 n.12.* Intervenor's difficulty is that the Board did not rest its decision on this reasoning; the Board assumed that Podewils qualified as a grievance **[**9]** adjuster.

We agree with petitioners. The inferences the Board draws from the evidence are quite unreasonable and therefore under *Allentown Mack Sales & Servs. v. NLRB, 522 U.S. 359, 378, 139 L. Ed. 2d 797, 118 S. Ct. 818 (1998),* the Board's finding must be rejected. *See also Warshawsky & Co. v. NLRB, 337 U.S. App. D.C. 149, 182 F.3d 948, 953 (D.C. Cir. 1999).* First there is an internal contradiction in the Board's decision. It purported not to disturb the ALJ's credibility findings. Yet it rejected the ALJ's conclusion, *based on his refusal to credit Burzynski,* that the business agent personally went to Gerald Nell to confront Podewils (rather than simply call to verify his employment) for the very purpose of seeking union recognition. The Board merely stated that it refused to draw an "inference" that the Local had an "improper retaliatory purpose" because of the personal visit.

The question, however, is whether that personal visit was itself evidence of the Local's attempt to gain recognition and the Board advanced no reasons to reject the ALJ's finding, buttressed by his credibility determination, that it was.

Moreover, the Board also [**10] refused to draw any inference from the fact that Burzynski left his business card and telephone number with Podewils, rejecting the ALJ's finding that Burzynski's purpose was to give Podewils a chance to change his mind concerning establishing a collective bargaining relationship with the Local. This also seems to be a rather off-hand rejection of the ALJ's credibility determination, but, in any event, the Board's explanation is ridiculous: that leaving his card with Podewils was consistent with "Burzynski's responsibility as a business representative to communicate with constituent members such as Podewils." One does not have the impression that Burzynski wished to communicate with Podewils as his business representative.

Burzynski admitted, moreover, that if Podewils had called with a change of mind Burzynski would not have filed charges. The ALJ took that as further evidence linking the Local's purpose to gain a collective [*541] bargaining relationship with the retaliatory fine against Podewils. The Board reasoned, however, that if Gerald Nell had recognized the Local the charges would have been mooted since Podewils would no longer be working for a non-union company. As petitioners [**11] suggest, that reasoning includes a logical flaw; Podewils would still have violated the I.B.E.W. Constitution, according to the Local, by his past behavior, so Burzynski's posture can only support a recognition motive.

Finally, the Board ignores a damaging piece of evidence -- the elephant in the room so to speak -- that along with Burzynski's visit and comments to Podewils conclusively

establishes that the Local sought a collective bargaining relationship with Gerald Nell and retaliated against Podewils for not providing it. That evidence is the size and basis for the fine. Counsel for the Board argues that the reasonableness of an internal union fine is not a matter which we can consider. That is so, but we certainly can look at the size and purpose of the initial fine, as did the ALJ, for the purpose of determining the Local's motivation. And the subsequent modification of the fine by the International, both as to the amount and basis, is not really relevant to the Local's intent. If anything, it is damning since it reflects the International's realization that the Local was in an untenable legal position.

Not only did the Local levy on Podewils the staggering fine of $ 100,000, **[**12]** it made clear that the fine was based not on Podewils' salary, but on the supposed amount of money the Local had lost because Gerald Nell was unorganized. We think it is quite astonishing that the Board ignores this evidence.

To be sure, as the Board noted, the Local never engaged in solicitation of authorization cards, picketing or handbilling, nor did it demand recognition. But unions often gain recognition -- particularly in certain crafts -- from the top down, by simply requesting recognition from a sympathetic manager or asking a sympathetic manager to help with organizing, which is exactly what the ALJ determined was the Local's purpose. That Burzynski did not make a demand for recognition or engage in public organizational efforts probably reflected a lack of employee support. It is flatly unreasonable, however, to conclude, as the Board does, that his solicitation was somehow not "concrete evidence" that the Local was *seeking* a collective bargaining relationship with Gerald Nell -- particularly when combined with the

balance of the evidence. The statement itself was not coercive but that hardly detracts from its probative value as an indication of the Local's objective. **[**13]**

In light of the whole record, the Board's treatment of Burzynski's inquiry as not "concrete" enough to establish that the Local was "actually" seeking a collective bargaining relationship at Gerald Nell is equivalent to an attempted robbery case where it is argued that a panhandler's "request" for a contribution is not concrete enough to establish his objective despite the fact that when he is refused he hits the victim in the head with a club.

* * *

Accordingly, the petition for review is granted, and the case is hereby remanded to the Board for further proceedings not inconsistent with this opinion.

So ordered.

NOTICE: This opinion is subject to formal revision swdwww before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

International Brotherhood of Electrical Workers, Local 494; International Brotherhood of Electrical Workers, Sixth District *and* Joseph G. Podewils *and* Gerald Nell, Inc. Cases 30-CB-4127 and 30-CB-4128

March 31,2004

[ENTERED: March 31, 2004]

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 31, 2000, the National Labor Relations Board issued a decision and order in this proceeding.[1] Thereafter, on December 28, 2001, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board for further proceedings not inconsistent with its opinion.[2] On remand, the Respondent and the Charging Parties filed briefs.

The Board has delegated its authority in this proceeding to a three-member panel.

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[1] 332 NLRB 1223.

[2] 274 F.3d 536 (D.C. Cir. 2001).

Having accepted the remand, the Board has considered the decision of the court of appeals and the briefs on remand. For the reasons below, the Board now finds that the Respondent violated Section 8(b)(1)(B), as alleged.

Section 8(b)(1)(B) provides that it shall be an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances. In our initial decision in this proceeding, the Board found that the Respondent IBEW Local 494 did not violate Section 8(b)(1)(B) and dismissed the complaint. Contrary to the finding of the administrative law judge, the Board found that the Respondent was not seeking to enter into a collective-bargaining relationship with the Employer, Charging Party Gerald Nell, Inc. Accordingly, the Board concluded that the Respondent did not violate Section 8(b)(1)(B).[3]

On review, the court of appeals squarely rejected the Board's finding that the Respondent was not seeking a collective-bargaining relationship with the Employer. The finding of the court of appeals, of course, is the law of the case. Because the Respondent was seeking a collective-bargaining relationship with the Employer and because all the remaining elements of an 8(b)(1)(B) violation have already been adjudicated and established in the initial

[3] As the Board noted in the initial decision, a union must, at a minimum, either have a collective-bargaining relationship with an employer, or at least be seeking to have such a relationship, in order to run afoul of Sec. 8(b)((1)(B). *NLRB v. Electrical Workers Local 340 (Royal Electric)*, 481 U.S. 573, 590 (1987).

proceeding, it follows that the Respondent violated Section 8(b)(1)(B), and we so find.[4]

Having found that the Respondent violated Section 8(b)(1)(B), we shall issue an appropriate remedial order.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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[4] An 8(b)(1)(B) violation is established when a labor organization imposes discipline on a supervisor/member that may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. *Florida Power & Light Co.* v. *Electrical Workers Local 641*, 417 U.S. 790, 804-805 (1974). In the initial proceeding, the Board adopted the judge's findings that Charging Party Podewils was an 8 (b)(1)(B) representative, as he engaged in 8 (b)(1)(B) duties as a grievance adjuster or collective bargainer. Further, the Board left undisturbed the judge's finding that the fine imposed on Podewils was likely to have adversely affected his performance of 8(b)(1)(B) duties. On remand, the Respondent contests these findings only to the extent of contending (in addition to seeking to have the Board revisit the issue of the Respondent's organizational intent) that Sec. 8(b)(1)(B) only comes into play when a union has a collective-bargaining relationship with the employer, which is absent here. See *Royal Electric*, supra, 481 U.S. at 596 (Scalia, J., concurring) (when the union's violation of Sec. 8(b)(1)(B) is indirect, that is, through the discipline of its members, would limit applicabililty of section to situations where there is an actual collective-bargaining relationship between the parties). This contention, however, does not reflect the state of current Board law, as noted above. Member Liebman believes that the Respondent's contentions regarding the application of Sec. 8(b)(1)(B) to unorganized set tings are worthy of consideration. In her view, however, the law of this case, on remand, calls for the application of current Board precedent.

The Respondent shall rescind and remove from its records all disciplinary action brought against Joseph G. Podewils, including refunding to him any fines that may have been paid to the Respondent, with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and shall notify Podewils that this has been done. We shall also order that the Respondent reimburse Podewils for any costs that Podewils may have incurred in defending himself at the Respondent's disciplinary hearing. See *Elevator Constructors Local 10 (Thyssen Elevator Co.)*, 338 NLRB No. 83 (2002).[5] We shall also order that the Respondent request that the International Union rescind its approval of the Respondent's discipline of Podewils and remove all references to such discipline from its records.

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Electrical Workers, Local 484, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining and coercing Gerald Nell, Inc., an employer, in the selection of its representatives for purposes of collective bargaining or the adjustment of grievances by preferring and processing charges against Joseph G. Podewils, by holding a trial and finding Podewils guilty of such charges, and by levying a fine against him.

(b) In any like or related manner restraining or coercing Gerald Nell, Inc. in the selection of its representatives for the purposes of collective bargaining or adjustment of grievances.

---

[5] Consistent with *Thyssen Elevator Co.*, supra, we shall not order reimbursement of any expenses incurred during the Board proceeding.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, rescind the charges brought and the fine levied against Joseph G. Podewils, remove all references to the charges and fine from its files, and within 3 days thereafter notify him and the Employer in writing that this has been done and that the charges and fine will not be used against him in any way.

(b) If any part of the fine levied against Joseph G. Podewils has been paid, within 14 days refund to him the entire amount paid and reimburse him for any expenses he has incurred in defending against these charges, with interest, as set forth in the remedy section of this sup plemental decision.

(c) Within 14 days of this Order, request that International Brotherhood of Electrical Workers rescind its approval of the discipline imposed on Joseph G. Podewils and remove all references to such discipline from its re cords.

(d) Within 14 days after service by the Region, post at its union office copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by

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[6] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Gerald Nell, Inc., if willing, at all places where notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2004

_____

Robert J. Battista, Chairman

_____

Wilma B. Liebman, Member

_____

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit or protection

Choose not to engage in any of these protected activities.

WE WILL NOT restrain and coerce Gerald Nell, Inc., an employer, in the selection of its representatives for purposes of collective bargaining or the adjustment of grievances by preferring and processing charges against Joseph G. Podewils, by holding a trial and finding Podewils guilty of such charges, and by levying a fine against him.

WE WILL NOT in any like or related manner restrain or coerce Gerald Nell, Inc. in the selection of its representatives for the purposes of collective bargaining or adjustment of grievances.

WE WILL, within 14 days of the Board's Order, rescind the charges brought and the fine levied against Joseph G. Podewils, remove all references to the charges and fine from our files, and within 3 days thereafter notify him and the Employer in writing that this has been done and the charges and fine will not be used against him in any way.

WE WILL, within 14 days of the Board's Order, refund to Joseph G. Podewils any of the fine levied against him that has been paid and WE WILL reimburse him for any

expenses he has incurred in defending against the charges, with interest.

WE WILL, within 14 days of the Board's Order, request that the International Brotherhood of Electrical Workers rescind its approval of the discipline imposed on Joseph G. Podewils and remove all references to such discipline from its records.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 494

FILED
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SUPREME COURT, U.S.

No. 05-252

In The
Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 494,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Respondents Joseph G. Podewils (hereafter "Podewils") and Gerald Nell Inc. ("Gerald Nell") accept the Question Presented as set forth in the Petition. (Petition, p. i.)

LIST OF PARTIES TO PROCEEDING

The Respondents Podewils and Gerald Nell accept the List of Parties set forth in the Petition. (Petition, p. ii.)

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29(6), Respondent Gerald Nell states that it has no parent corporation and that no publicly held company owns ten percent or more of Gerald Nell's stock. Respondent Joseph G. Podewils is an individual person.

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RULE

Sup. Ct. R. 29(6) ii

OPINIONS BELOW

The Respondents Podewils and Gerald Nell accept the citations of opinions and orders entered in the case by lower courts and administrative agencies as set forth in the Petition. (Petition, p. 1.)

JURISDICTION

The Respondents Podewils and Gerald Nell accept the statement regarding jurisdiction of the Court as set forth in the Petition. (Petition, p. 1.)

STATUTORY PROVISIONS INVOLVED

The Respondents Podewils and Gerald Nell accept the citation of the statutory provision involved the present matter as set forth in the Petition. (Petition, p. 1.)

STATEMENT OF THE CASE

Joseph G. Podewils had been a member of International Brotherhood of Electrical Workers, Local 494, ("Local 494") for more than 20 years when he went to work for Gerald Nell, a non-union shop, as a manager in October 1997. *Electrical Workers Local 494 (Gerald Nell)*, 332 NLRB 1223, 1226 (2000). Upon accepting the job as manager of the electrical division of Gerald Nell, Podewils attempted to resign membership in Local 494, but mistakenly submitted an honorary withdrawal card rather than his resignation. *Id.* Local 494 was aware that Podewils was going to work for a non-union contractor, and that Podewils would remain under the rules of the union constitution, which

prohibited Podewils from non-union employment, if he withdrew rather than resign. *Id.* However, Local 494 did not advise him that he should resign rather than withdraw. *Id.*

In November 1997, Local 494 business representative Leon Burzynski received an "anonymous tip" that Podewils was working for Gerald Nell. *Id.* at 1228. On December 1, 1997, Burzynski visited Podewils at Gerald Nell's location and confronted Podewils. *Id.* Burzynski asked Podewils "what would be the opportunity of [Podewils] working to organize" Gerald Nell. *Id.* Podewils responded to Burzynski that this was not an option. *Id.* Soon thereafter, on December 15, 1997, Burzynski filed internal charges with Local 494 against Podewils, alleging that Podewils had violated the union constitution by working for a non-union contractor. *Id.* In February 1998, Local 494 held a hearing on Burzynski's charge against Podewils. *Id.* at 1226. Based upon the estimated dollar value of the electrical work that Gerald Nell had performed during Podewils' employment, Local 494 issued a $100,000 fine against Podewils – an amount the court of appeals described as "staggering." *Podewils v. NLRB*, 274 F.3d 536, 541 (D.C. Cir. 2001). On internal appeal, the International Union reduced the fine. *Electrical Workers Local 494 (Gerald Nell)*, 332 NLRB at 1228.

Podewils and Gerald Nell filed an unfair labor practice charge against Local 494 and the International Union, alleging that the Unions' actions violated § 8(b)(1)(B) of the Act. The Administrative Law Judge found that Podewils was engaged in § 8(b)(1)(B) activities on behalf of Gerald Nell because he "settled all grievances or disputes that arose among these employees," and also handled payroll disputes. *Id.* at 1228. The ALJ also found that Local 494 was seeking to organize Gerald Nell's employees. *Id.* at 1228-1229. Finally, the ALJ also found that the $100,000 fine was intended to adversely affect Podewils' performance of Section 8(b)(1)(B) duties. *Id.* at 1229. Based upon these findings, the ALJ held that Local 494 had violated Section 8(b)(1)(B) of the Act. *Id.*

Upon review of the ALJ's Decision and Order, the Board, citing the Court's opinion in *NLRB v. Int'l Bhd of Electrical Workers, Local 340 (Royal Electric)*, 481 U.S. 573, 590 (1987), overruled the ALJ and found that there was insufficient evidence to conclude that Local 494 was seeking to organize Gerald Nell's employees. *Id.* at 1224. Therefore, the Board found that Local 494 had not violated § 8(b)(1)(B) of the Act. *Id.* On petition for review, the court of appeals reversed the Board's decision, holding that the Board's finding that Local 494 was not seeking a collective bargaining relationship with Gerald Nell was not supported by substantial evidence, and remanded the case to the Board for further proceedings. *Podewils v. NLRB*, 274 F.3d 536 (D.C. Cir. 2001). On remand, the Board entered a finding that Local 494 had violated § 8(b)(1)(B), consistent with the court of appeals' decision. *Int'l Bhd of Electrical Workers, Local 494*, 341 NLRB No. 71 (2004). A second petition for review was denied by the court of appeals. *IBEW, Local 494 v. NLRB*, 2005 U.S. App. LEXIS 9770 (D.C. Cir. May 24, 2005).

REASONS TO DENY PETITION

The narrow issue raised by the Petition is one that the Court has already addressed and resolved. The Petitioner argues that "[t]he National Labor Relations Board exceeded its statutory authority when it determined that § 8(b)(1(B) of the National Labor Relations Act may be violated where the employer has no collective bargaining relationship with the union." (Petitioner's brief, p. 4.) However, the National Labor Relations Board's ("NLRB") rule that a violation of § 8(b)(1)(B) of the National Labor Relations Act ("the Act") may occur in the absence of a collective bargaining relationship, so long as the offending union is *seeking* such a

relationship, has been considered and accepted by the Court. *Royal Electric*, 481 U.S. at 590.

Section 8(b)(1)(B) of the Act provides that it is an unfair labor practice for a labor organization or its agents to "restrain or coerce...an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances[.]" 29 U.S.C. § 158(b)(1)(B). Such coercion may occur *directly*, through actions directed at the employer itself, or *indirectly*, such as when a labor organization's discipline of a supervisor-union member has an adverse affect on the supervisor-member's performance of § 8(b)(1)(B) duties. *Royal Electric*, 481 U.S. at 590.

The Board's rule, challenged by the Petitioner, that unlawful indirect coercion may occur where a union disciplines a supervisor-member engaged in §8(b)(1)(B) duties and the union either has or seeks a collective bargaining relationship with the employer, was previously accepted by the Court in *Royal Electric*, supra. The Court of Appeals for the D.C. Circuit, in its second opinion in the instant case, expressly noted the Court's acceptance of the Board's rule:

> Having set forth the rule governing this case once already, this Court cannot change its position now. Indeed, to do so in light of *Royal Electric*, would be particularly inappropriate, as the Supreme Court accepted the Board's reading in *Royal Electric*, instructing that "union discipline directed at supervisor-members without § 8(b)(1)(B) duties, working for employers with whom *the union neither has nor seeks a collective-bargaining relationship*, cannot and does not adversely affect the performance of §

> 8(b)(1)(B) duties." 481 U.S. at 595 (emphasis added).

IBEW, Local 494 v. NLRB, 2005 U.S. App. LEXIS 9770, 3-4 (D.C. Cir. May 24, 2005). (Appx. to the Petition, A3-A4.)

As noted by the court of appeals, and contrary to the position advanced by the Petition, the majority opinion in *Royal Electric* expressly did not limit the application of § 8(b)(1)(B) to instances of union disciplinary action against a supervisor-member in which there is an existing collective bargaining relationship between the employer and the charged union. To the contrary, in *Royal Electric*, the Court reasoned that the incentive for the union to attempt to influence the supervisor-member's § 8(b)(1)(B) duties exists not only where the union has a current collective bargaining relationship with the union, but also where it seeks such a relationship:

> But when a union has no collective bargaining relationship with an employer, *and does not seek to establish one*, both the incentive to affect a supervisor's performance *and* the possibility that an adverse effect will occur vanish.

Royal Electric, 481 U.S. at 590 (emphasis added). Thus, the absence of an existing collective bargaining relationship is not a determinative factor under § 8(b)(1)(B), and the Court's opinion in *Royal Electric* so stated. Therefore, the issue raised by the Petition was previously considered and resolved by the Court in *Royal Electric*.

Discounting these relevant portions of the majority decision, the Petitioner seeks to have the Court adopt the reasoning set forth in Justice Scalia's concurring opinion in

Royal Electric – that no § 8(b)(1)(B) violation can occur where the allegedly offending union does not have a collective bargaining relationship with the charging employer. While the Petitioner seemingly argues that the majority opinion in *Royal Electric* is consistent with the Petitioner's argument, the clear disparity was not lost on Justice Scalia. Justice Scalia expressed his disagreement with the majority opinion on the specific issue that is the subject of the instant Petition:

> And while I agree with much of the reasoning of [the relevant portion of the majority opinion], I cannot join it, principally because in my view it does not matter whether the Union intended to represent [the employers]; and if it did matter, I would find inadequate basis for overturning the Board's factual finding of representational intent. I would affirm the Court of Appeals solely on the ground that the Union had no collective bargaining agreement covering either [employer].

481 U.S. at 596 (Scalia, J.concurring). While Justice Scalia's reasoning does endorse the view advanced by the Petition, it is distinct and different from the majority opinion on the very issue that is the subject of the instant Petition. Justice Scalia would have found no violation of § 8(b)(1)(B) based upon the lack of a collective bargaining relationship – the majority opinion, however, did not.

The Petition incorrectly asserts that it was the Court's reasoning that, while *direct* coercion may occur when the union is merely seeking a collective bargaining relationship, there can be no *indirect* coercion unless there is an existing

collective bargaining relationship. (Petition, p. 7-8.) This is not the *Royal Electric* majority's reasoning.

In actuality, it was the majority's reasoning that a finding of a violation of § 8(b)(1)(B) based upon *direct* coercion is not at all dependent upon the union's having or seeking a collective bargaining relationship:

> Direct coercion of an employer's selection of a § 8(b)(1)(B) representative would always be a § 8(b)(1)(B) violation, whether or not the union has or seeks a collective bargaining relationship with an employer.

481 U.S. at 590, fn. 13. On the other hand, the majority stated that in cases of *indirect* coercion, such as a case in which the union has disciplined a § 8(b)(1)(B) supervisor-member, there is no violation of that section unless it is shown that the union either has or is seeking a collective bargaining relationship. *Id.* The Court explained the reason for this distinction:

> But when a union has no collective bargaining relationship with an employer, and does not seek to establish one, both the incentive to affect a supervisor's performance *and* the possibility that an adverse affect will occur vanish.

Id. The Petition seizes upon and isolates the Court's statement that "the assumption...that an adverse affect can occur simply by virtue of the fact that an employer representative is disciplined for behavior that occurs during performance of § 8(b)(1)(B) tasks – is not applicable when the employer has no continuing relationship with union." *Id.* at 590. When read in the context of the Court's distinction